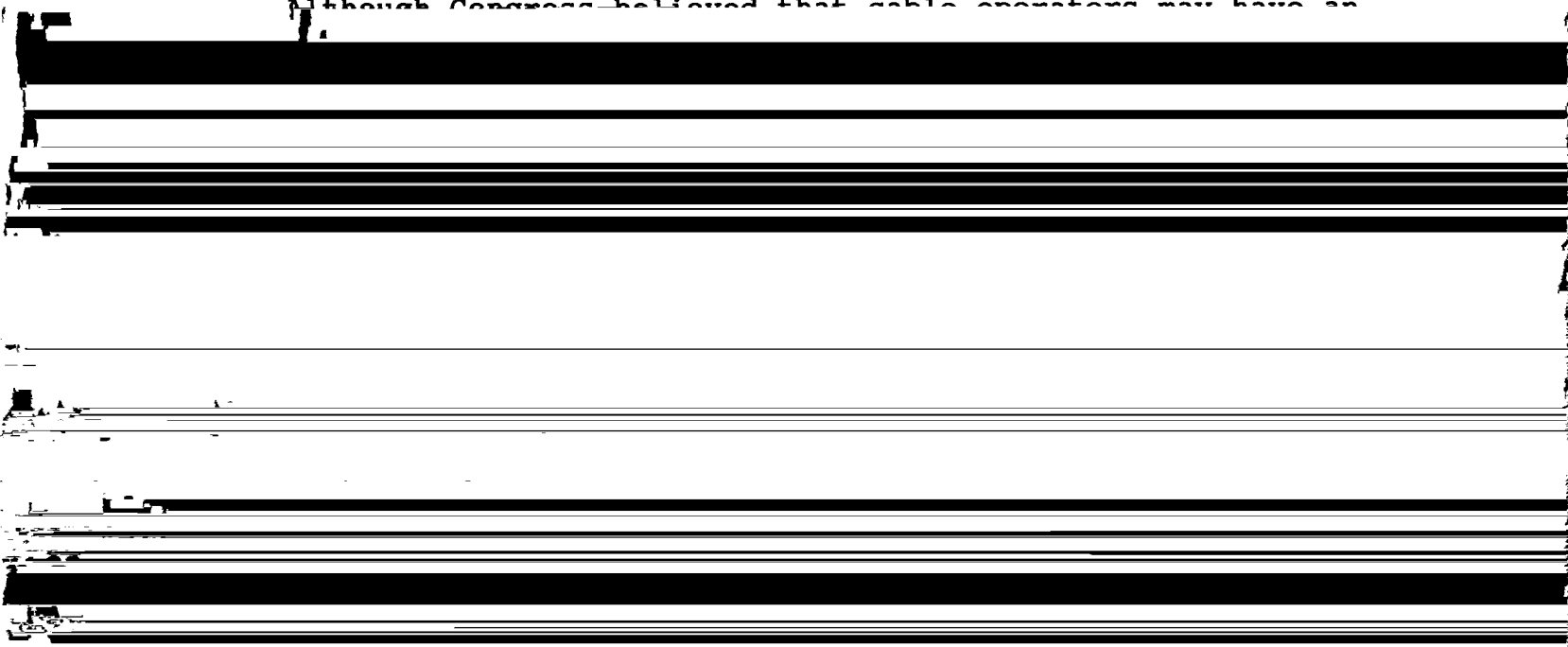


limits in order to prevent cable operators from impeding the flow of programming to consumers. An operator having an interest in a cable system on the order of 5% cannot impede that flow since it could not influence the system's dealings with programmers. Commenters urging adoption of the broadcast attribution criteria do so primarily for reasons of uniformity. (BellSouth at 1-2; see also GTE at 4) That may be acceptable if the statutes under which the attribution standards were set were all designed for the same purpose, but that is not the case.

CIC/CC propose a 25% attribution standard. TWE believes this proposal is also too stringent. CIC/CC argued that the 25% standard would be an appropriate means of identifying those operators who have an incentive to impede the flow of programming from programmers to consumers. (CIC/CC at 37-38) We believe CIC/CC overstate the case.

Although Congress believed that cable operators may have an



incentive". Such a possibility is too remote to warrant action by the Commission.

TWE recognizes that in its regulations implementing Section 19 of the 1992 Cable Act, 9/ the Commission recently adopted attribution criteria that mirror the telephone-cable cross-ownership rules. The Commission specifically rejected application of the "single majority shareholder" concept in this context. (§ 19 Report at ¶ 31) We believe that the strict attribution criteria adopted under Section 19 are inappropriate both under that section and for use under Section 11. Possession of a small minority interest in a cable programmer simply would not have the effects the Commission posits, and that is true under either provision.

Moreover, the Commission's choice of a strict attribution standard under Section 19 does not require use of the same standard under Section 11. Section 19 was enacted to prevent discriminatory practices by cable operators against multichannel competitors with regard to program access. Section 19 thus directly addresses

9/ See First Report and Order, MM docket No. 92-265, ¶¶ 31-32 (adopted April 1, 1993) ("§ 19 Report"). Specifically, a cable operator with 5% or more of the stock of a programmer, whether voting or nonvoting, is deemed to hold an attributable interest in that programmer for purposes of the regulations implementing Section 19. (Id. at ¶ 31)

Congress's goal of "promot[ing] competition in the multi-channel video marketplace" (see Senate Report at 1 (1991); see also House Report at 26 (1992)), by ensuring that multi-channel distributors do not face obstacles in obtaining programming. In adopting such regulations under Section 19, the Commission itself emphasized that it was "adopting a fairly strict attribution standard". (§ 19 Report at ¶ 11) The Commission observed that "various attribution rules have been used by the Commission . . . depending on the specific policy or rule in question", and that in its view Section 19 "warrants a relatively inclusive attribution rule". (Id. at ¶ 31; emphasis added) The attribution standard applied to Section 19 is inappropriate with regard to subscriber limits because a 5% interest-holder would be powerless to influence the cable system's programming choices. 10/ (See TWE at 30-31)

10/ The Senate expressed its intent that the Commission "use the attribution criteria set forth in the 47 C.F.R. Section 73.3555 (notes) or other criteria the FCC may deem appropriate". (Senate Report at 80) The attribution criteria imposed by the Commission in the implementation of Section 19 are far more onerous than those applied in the broadcast context because § 73.3555 incorporates the single majority shareholder rule and limited partnership insulation. Nowhere in the legislative history is such a stringent attribution standard supported.

E. Commenters Uniformly Oppose the Imposition of
Certification Requirements as a Method of Enforcing
Subscriber Limits.

The Commission asked for suggestions as to how
subscriber limits should be enforced, and it suggested the

its resolution upon particular facts concerning local interests or conditions. Publicly available information will readily enable the Commission to act if any operator's size begins to verge on the limit. Particularly because only one cable operator is now even remotely near the level TWE has proposed for the limit, establishing a complaint procedure appears to be a waste of the Commission's scarce resources.

F. Most Commenters Believe That Review Every Five Years Is Appropriate.

The Commission proposed to review the subscriber limits every five years to determine whether the limits are reasonable under prevailing industry conditions. (NPRM at ¶ 40) Three of the four commenters responding to that proposal, including TWE, agreed with the Commission's position. (TWE at 35; NCTA at 23; MPAA at 6-7)

The fourth commenter, LG, proposed a three year period "to ensure that the subscriber limits do not quickly become obsolete due to changes in circumstances or technological developments". (LG at 20) And, although MPAA supports a five year period, it recommended allowing for the filing of petitions for rehearing at any time based on a showing of significant changed circumstances or a failure of other remedies mandated by the Act. (MPAA at 6-7)

TWE continues to believe that reviewing the limits more often than every five years is inappropriate. Conducting reviews more frequently would not allow sufficient time for industry trends to take shape.

II. CHANNEL OCCUPANCY LIMITS

A. The Commission's Attribution Criteria Should Focus on Control.

Many commenters are in accord with TWE's recommendation that the Commission's attribution criteria should focus on control, which most commenters addressing this issue defined as voting control, i.e., the ability to elect a majority of the programmer's board of directors.

(Discovery at 19; IFE at 7; Liberty at 17-18; NCTA at 28-29; Viacom at 16 n.22) Among commenters proposing a control standard, some argued that the ability to manage the programmer should be considered an indicium of control. (Discovery at 19; NCTA at 28)

In this connection, numerous commenters agreed that the 5% attribution criteria for broadcast contained in 47 C.F.R. § 73.3555 are inappropriate in this context. (CIC/CC at 38; NCTA at 28; IFE at 7-8; Liberty at 13-14; Cablevision at 11) As TWE previously discussed at length (TWE at 37-40), application of those attribution criteria would discourage investment in new and innovative

programming. Other commenters echoed this concern. (NCTA at 29; IFE at 7; Liberty at 14)

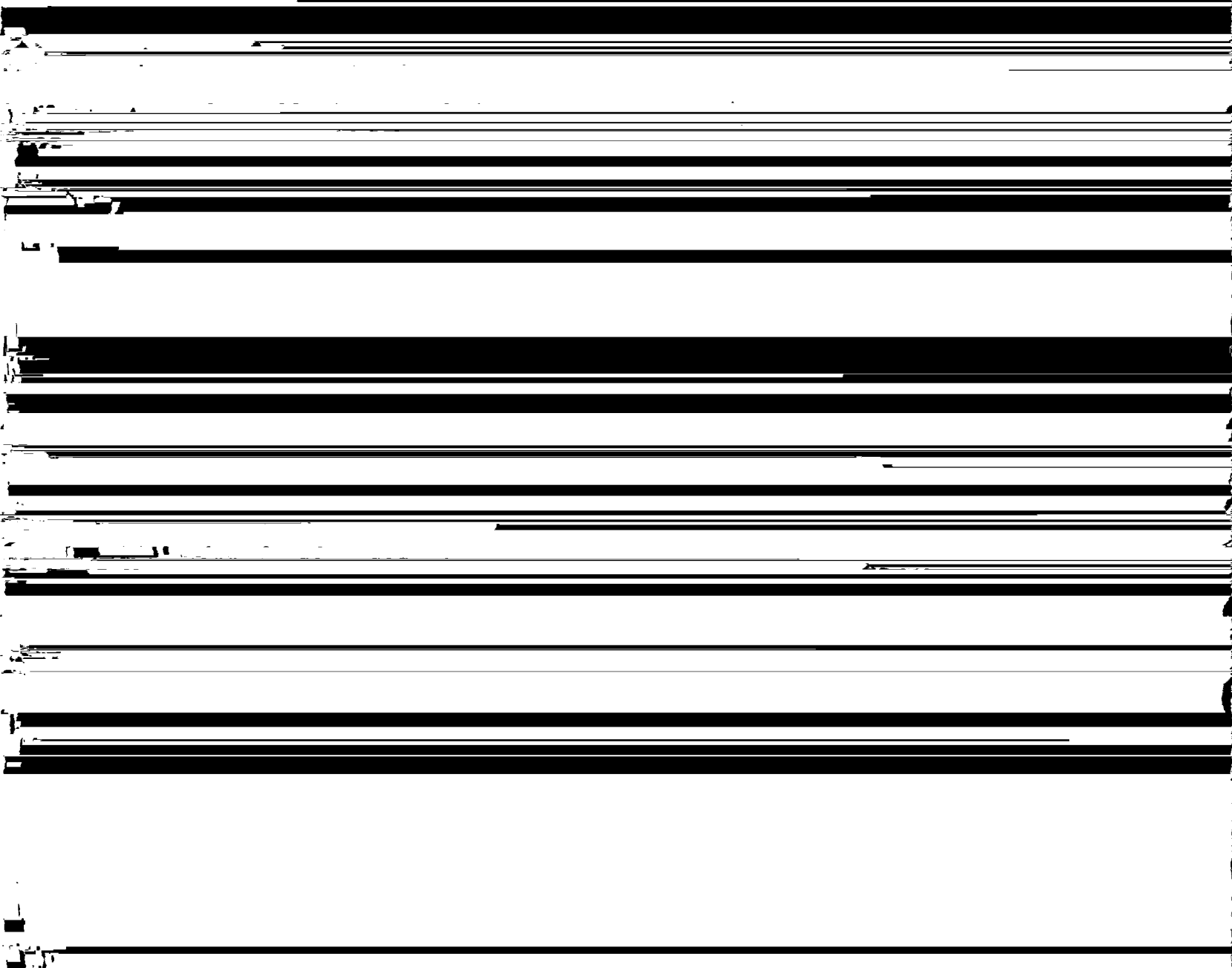
Two commenters argued that the broadcast attribution rules are appropriate. (BellSouth at 1-2; TBS at 19) TBS pointed out that the "single majority shareholder" rule contained in § 73.3555 should apply in this context. 11/ As part of a three-part attribution test, TCI also submitted that the single majority shareholder rule should be adopted by the Commission. (TCI at 13-14) 12/ TWE agrees that if an attribution standard requiring attribution at a level below the 50% control threshold is adopted, the single majority shareholder rule should also be adopted.

Two commenters proposed a percentage of interest at which ownership should be attributed. CIC/CC proposed a 25% attribution standard. (CIC/CC at 38) MPAA recommended a 15% test. (MPAA at 7) GTE and INTV argued that the attribution standards used in the telephone-cable television

cross-ownership rules are appropriate. (INTV at 15-16;
GTE at 3) 13/

TWE continues to believe that the attribution
criteria for purposes of channel occupancy limits should
focus on control, and that application of a fixed percentage

contrast, Section 11 focuses on a cable operator's potential favoritism toward affiliated program services in making its programming decisions. Whatever the merit of the 5% attribution standard in the Section 19 context (and TWE believes that standard is inappropriate in that context), the standard is especially inappropriate under Section 11 because Congress recognized that cable operators have



The sole dissenter, LG, did not offer any explanation for its position. (See LG at 21) As the NCTA explained, "reducing the base on which the channel occupancy calculation is made will . . . deter operators from investing in new, untried services since they will likely be foreclosed from adding them without dropping a more popular service". (NCTA at 30-31) Subtracting these channels from the base will thus "impair the development of diverse and high quality video programming", 47 U.S.C. § 533(f)(2)(G), contrary to Congress's objective.

TWE proposed that pay and pay-per-view channels should not be counted as "occupied" channels in any calculation under the channel occupancy limits (although they must obviously be included in the number of activated channels). (TWE at 43) Two commenters agreed with TWE's recommendation. (IFE at 9; NCTA at 31) Furthermore, NCTA also supported TWE's alternative proposal that pay and pay-per-view channels should be added into the calculation according to the percentage of subscribers who receive them. (NCTA at 31)

The only additional commenter to raise the issue of pay channels, Discovery, argued that premium channels should be added into the calculation. (Discovery at 16) TWE urges the Commission to recognize that, typically, only

a fraction of a system's subscribers will subscribe to a premium service, but the operator must reserve an entire channel to carry such a service. If the channel occupancy limits are applied to pay channels, operators may find that they are forced to choose between a basic channel received by substantially all subscribers and a premium channel that will typically be received by only a fraction of subscribers. Because the dropping of a channel often produces great subscriber dissatisfaction, a rule that counts a pay channel as an "occupied" channel may create pressures for operators to drop pay services. Congress certainly did not intend such a result.

The issue of multiplexed services was only addressed by TBS, NCTA and TWE. (TBS at 18; NCTA at 31) TBS argued that "each multiplexed channel should count toward the limit" because "a multiplexed channel provides no more diversity than an entirely different service". (TBS at 18) The NCTA, however, agreed with TWE that multiplexed services should not be added into the calculation. (NCTA at 31)

TBS's argument should be rejected. Multiplexing does add diversity in the sense that it increases subscriber viewing options. Moreover, although TBS's point seems to be that a programmer who creates an entirely new programming

service adds more "diversity" than does a programmer who multiplexes an existing service (TBS at 18), that is not in fact true. Ordinarily, in the communications context, diversity refers to diversity in the ownership of programming. Two different services owned by the same programmer are not more "diverse" in this sense than two multiplexed versions of one service. TBS's apparent argument that multiplexing somehow has less merit should be rejected. Multiplexing is an innovative technique that should not be discouraged.

Among the commenters addressing the issue of application of the limits to national or regional vertically integrated programmers, there was unanimous agreement that the limits should only be applied to vertically integrated programmers who operate nationally. (TCI at 36-37; Viacom at 11-13; Liberty at 25-27; NCTA at 31; ARC at 1-6) Regional and local programming services promote diversity and serve the public interest by providing programming designed to suit the needs of a particular community. Accordingly, TWE urges the Commission to adopt limits that apply only to national vertically integrated programmers.

C. The Channel Occupancy Limits Should Apply Only
to Programmers Affiliated with the Particular Operator.

Among the commenters addressing the issue of whether the limits should apply to any vertically-integrated programmer or only to programmers affiliated with a particular operator, all agree with the Commission's tentative conclusion that the latter view is preferable. (Discovery at 16 n.11; E! at 7; TBS at 15-17; TCI at 35-36; Viacom at 6-8; Cablevision at 10-11; CIC/CC at 36; MPAA at 7; Liberty at 24; IFE at 10; NCTA at 32) The Commission proposed this approach. (NPRM at ¶ 50) As TWE previously discussed (TWE at 46), there is no reason for an operator to favor a nonaffiliated programmer. Moreover, the application of channel occupancy limits to any vertically integrated programmer would have a significant adverse effect on incentives to invest in programming.

In this connection, two commenters suggested alternative approaches to the application of channel occupancy limits. TBS recommends "an approach that establishes limits in terms of each video programmer" (TBS at 14), arguing that the limit should apply on a programmer-by-programmer basis so that each individual programmer could occupy a certain percentage of an

operator's channels. ^{15/} Under TBS's approach, TBS and other programmers would each be allotted a specific percentage of an operator's channels. TWE believes that TBS's approach is misguided.

TBS argues, first, that its view is mandated by the plain language of Section 11(c), which requires the Commission to limit the number of channels that can be occupied "by a video programmer in which a cable operator has an attributable interest". 47 U.S.C. § 533(f)(1)(B). From Congress's use of the word "a", TBS concludes that Congress meant "each". TWE believes that TBS reads too much significance into Congress's choice of words. If the statute is to be read without careful regard for its purpose, as TBS proposes, then this same language could be read to justify channel occupancy limits that apply without regard to whether a particular program service is affiliated with any particular cable operator--a result that all commenters, TBS included, agree should be rejected. (See p. 30 above) It is clear that the Commission has discretion in this area.

^{15/} The NCTA also offers this approach as an alternative to limiting the number of channels vertically integrated programmers affiliated with a particular operator can occupy. (See NCTA at 32 n.63)

IFE proposed that the "rules limiting the number of channels occupied by vertically integrated programmers should focus on discriminatory operators". (IFE at 3) Further, this commenter stated that the limits should only be imposed if "a rival non-integrated cable network complains that it is being denied access as a result of that owner's programming decisions." (IFE at 4) IFE's approach should be rejected because it lacks any ascertainable standard against which operators can evaluate their conduct and would permit litigation by a programmer for commercial purposes where an objective observer would not find any ground for faulting an operator's programming choices.

D. In Determining the Channel Occupancy Limits, the Commission Should Adopt a Limit High Enough--at Least 50% of Activated Channels--to Preserve the Benefits of Vertical Integration.

Many commenters agree with TWE's position that the channel occupancy limits adopted should be sufficiently high to preserve the benefits of vertical integration. (See, e.g., E! at 7-8; TBS at 17; TCI at 31-35; Liberty at 23; NCTA at 26-27) Although these commenters did not provide a specific percentage limit, they all emphasized the need for limits that would not impair incentives to invest in programming. TCI remarked that legal and economic precedent

"justify allowing cable operators to dedicate a significant amount of their system capacity to affiliated program services". (TCI at 31) Moreover, TBS stated that "whatever limits the Commission adopts must be sufficiently liberal to give programmers like TBS the flexibility and ability to continue to expand and gain access". (TBS at 17) Accordingly, TWE urges the Commission to adopt limits that are consistent with legal and economic precedent and that are high enough to avoid the impairment of the substantial benefits gained through vertical integration.

Some commenters provided a specific percentage at which the limits should be set. Discovery proposed that the channel occupancy limits should be set at well above 50% to avoid injury to programmers, discouragement of new programmers and deprivation to consumers of programs. (Discovery at 16) Viacom suggested that "any cable system with an activated channel capacity of 54 channels or less may not devote more than 50% of its activated channel capacity to commonly owned, non-exempt national program services". (Viacom at 16-17)

The MPAA, however, recommended that "a cable operator should not be permitted to program more than 20 percent of its activated channels with program services in which it has an ownership interest". (MPAA at 7)

Adopting a 20% limit was specifically rejected by various commenters. (See, e.g., Liberty at 23; NCTA at 26-27) A 20% limit would severely jeopardize the flow of investment into new programming and, in conjunction with a 5% attribution standard, would force many systems to drop program services from their channel line-ups. (See TWE at 51-53) Accordingly, the Commission should adopt channel occupancy limits that comport with the statutory demand of reasonableness and that are sufficiently high to serve the public interest by not depriving viewers of programming services. TWE believes that a channel occupancy limit of at least 50% of activated channels is necessary to achieve the statutory purpose.

In this connection, TWE submits that if the Commission applies a strict attribution standard like that adopted under Section 19, it will be absolutely imperative that the Commission set the limits at a correspondingly high level in order to avoid severe negative effects on the flow of investment into video programming and to ensure widespread distribution of programming. This is particularly so in view of the fact that under the must carry, PEG and leased access regimes operators have already lost the ability to select the programming that will appear on a substantial portion--in TWE's case, an average

estimated at over 30% and in some cases up to 50%--of their channel capacity.

Setting the channel occupancy limit at too low a level will have some or all of the following effects, none of which is desirable, and none of which was intended by Congress. Either: (a) operators will be required to drop popular services like CNN, in which case subscribers will be outraged; (b) they will be required to drop "niche" services like BET, in which case significant viewer segments, and particularly minority viewers, will be underserved; or (c) they will be required to drop new, unproven services, in which case they will soon cease to invest in such services. Vertically integrated firms like TWE have been in the forefront of the development of new programming services. The Commission must take care lest its channel occupancy limits thwart the development of more viewing options for the public.

In this connection, one commenter suggested an unreasonably restrictive approach that flatly contradicts Congress's direction to the Commission that it "not impose limitations which would impair the development of diverse and high quality video programming". 47 U.S.C. § 533(f)(2)(G). INTV argued that the Commission should employ the following two step regulatory structure:

(i) "cable operators should be permitted to devote no more than 20 percent of existing channel capacity to program services in which they have an equity interest", and
(ii) "the absolute number of program services appearing on a cable system cannot exceed the number of services owned by the MSO on February 9, 1993". (INTV at 12) Nowhere in the statute or the legislative history is this approach supported. The "second step" of this proposal would artificially constrain the ability of operators to offer affiliated programmers without any relation to the congressional concern of undue potential favoritism.

Like TWE, some commenters recommended that the channel occupancy limits should not apply to any vertically integrated programming service that has achieved a certain percentage level of distribution among the subscribers to nonaffiliated operators. ^{16/} Both Discovery and Viacom suggested that programming services that serve more than 50% of subscribers nationally on systems not affiliated with that programmer should not be subject to the limits. (Discovery at 18; Viacom at 4-6) As Viacom stated, "widespread carriage of a program service by nonaffiliated

^{16/} TWE recommended that vertically integrated services that are received by over 40% of the subscribers of nonaffiliated cable systems nationally should be exempt from the limits. (TWE at 54-55)

systems" does not indicate that carriage of that programmer by an affiliated system is based on discrimination; rather, it "reflects the fact that the service is highly valued by the marketplace". (Viacom at 5) Accordingly, TWE urges the Commission to exempt programming services that have broad popularity among affiliated and nonaffiliated systems. TWE suggests that the percentage of subscribers receiving the service should be 40% because, in addition to the lack of concern about discriminatory carriage, including these services in the limits would discourage an operator from carrying less popular affiliated services. 17/

In a similar vein, two commenters recommended that programming services that have low penetration levels should be exempt to permit the introduction and growth of new programming services. E! suggests that a service that reaches under 50% of all cable households should be exempt as one way to enable viewers to continue to receive narrowly targeted and unique programming that otherwise may be

17/ IFE suggested a similar approach in connection with its position that the limits should be applied only when a rival service complains that it is being denied access. This approach would grant cable operators the opportunity "to rebut any regulatory channel limitation by showing legitimate business reasons for offering stations its controls as part of its programming mix". (IFE at 5) TWE's proposal is a more concrete way to address the concern that viewer preferences not be thwarted.

dropped. (E! at 8-10) ^{18/} Similarly, Cablevision recommends that "the Commission should not attribute a cable operator's ownership interest in a service that has yet to achieve a significant audience" and suggests that this exemption would apply to services reaching fewer than one-third of all households in the geographic area in which the service is available. (Cablevision at 12) TWE believes that the better course is to exempt services that have already demonstrated broad-based subscriber appeal, as the decision to carry such services ordinarily would not be influenced by ownership considerations.

E. Emerging Technologies Justify Less Stringent Channel Occupancy Limits for Systems with Expanded Channel Capacity.

The Commission's proposal to take into account emerging technologies by establishing a threshold beyond which the channel occupancy limits would no longer apply is strongly supported by the commenters. (See, e.g., Discovery at 17; E! at 10; Viacom at 15-16; CIC/CC at 40; NCTA at 33)

^{18/} E! proposes that the limits should not apply to services that have unique formats or are targeted to small, specialized audiences. (E! at 8) E! suggests that other possible ways to implement this proposal would be to exempt a service that produces 30% or more original programming daily or to exempt a service that is unique on its face (e.g., minority or foreign language programming). (Id. at 9)

Among these commenters, four proposed that 54 channels would be an appropriate channel capacity threshold, in agreement with TWE's recommendation. (See E! at 10; CIC/CC at 40; Viacom at 15-16; TWE at 57) This threshold is well above the average number of activated channels received by cable subscribers today and would encourage operators to upgrade their systems. Discovery proposed that the threshold should be set at 29 channels and that no limits should apply to systems with more than 53 channels. (Discovery at 17) NCTA suggested that the limits should no longer apply to those channels on a system in excess of 36. (NCTA at 33) NCTA explained that "a system's leased access obligations are triggered at 36 channels as are a system's unrestricted non-commercial must-carry obligations". (Id.) Accordingly, TWE urges that a 54 channel threshold is appropriate and reasonable with regard to the proposals of all the commenters.

Only the MPAA disagreed with the Commission's proposal to establish a threshold beyond which the limits would no longer apply. (MPAA at 9) This commenter argued that the establishment of a threshold would be premature because it is unclear how expanded channel capacities will be utilized. (Id.) The MPAA overlooks the fact that 28% of

cable subscribers currently are receiving 54 or more channels. (See NPRM at ¶ 53)

Several commenters also recommended an exemption for systems employing the technology of digital signal compression. (See, e.g., Viacom at 16 n.21, TCI at 37-39; Discovery at 17) To encourage the development and utilization of innovative technologies, the Commission should exempt systems that expand capacity in this manner.

F. The Channel Occupancy Limits Should Not Apply in Communities Where Effective Competition Has Developed.

All commenters, except the MPAA, strongly supported the proposal that the channel occupancy limits should not apply in areas where effective competition exists. (See, e.g., Discovery at 18-19; TBS at 17 n.29; TCI at 39-41; Viacom at 17-18; CIC/CC at 40; IFE at 10; NCTA at 34; but see MPAA at 10) "In the face of such competition, cable operators would have little incentive to make programming decisions on any basis other than marketplace factors". (CIC/CC at 40-41) Accordingly, TWE urges the Commission to eliminate the channel occupancy limits where effective competition has developed.

The sole dissenter, MPAA, contended that "if the competitive multichannel distributor is itself highly

vertically integrated, removing channel caps from the cable system could result in foreclosure of nonaffiliated programmers from either outlet". (MPAA at 10) As Viacom explained, however, "the Senate Report contemplates that the existence of effective competition will preclude cable operators from exercising the market power which serves as the rationale for the channel occupancy rules." (Viacom at 17-18, citing Senate Report at 24) The MPAA's position is, therefore, inconsistent with the legislative history and highly speculative as well.

G. The Channel Occupancy Limits Should Be Enforced on a Complaint Basis.

Two commenters agreed with TWE's approach that the Commission alone should have responsibility to enforce the limits. (NCTA at 36; Viacom at 19) This approach would provide consistency and uniformity in enforcement and avoid placing the burden of enforcement on franchising authorities. Two commenters, NCTA and CIC/CC, also supported TWE's proposal that the channel occupancy limits should be enforced on a complaint basis only. (NCTA at 36; CIC/CC at 42) 19/ CIC/CC stated that an annual

19/ Viacom proposed that the channel occupancy limits be enforced by certification to the Commission as part of the annual reporting requirement regarding ratemaking. (Viacom at 18-19)

certification process "will prove unnecessary for the vast majority of cable operators and unhelpful for the vast majority of franchising authorities". (CIC/CC at 42)